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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

**PLAINTIFFS' MOTION FOR
SUMMARY ADJUDICATION
OF FOUR LEGAL ISSUES**

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1 **I. INTRODUCTION**

2 The Court has set the Adams plaintiffs' Clean Water Act suit for trial beginning on May
3 19, 2008. The Court has granted Adams leave to file this summary judgment motion addressing
4 four discrete legal questions, the resolution of which will clarify issues for trial:

5 1. Does the fact that there are post-complaint (and still ongoing) violations of the still-
6 applicable 1998 permit monthly total dissolved solids (TDS) limitations during Arctic Grayling
7 spawning season mean that all historical monthly TDS violations (even those outside Grayling
8 spawning season, although there is no longer a monthly TDS permit limitation outside Grayling
9 spawning season) are "ongoing or capable of repetition"?

10 2. Can Teck Cominco challenge a permit condition during an enforcement action and
11 thus avoid liability for violating the monthly cyanide permit limitation of 4 µg/ml found in
12 Section I.A.1 of the permit because Section I.A.5.d lists 9 µg/ml as the "Compliance Evaluation
13 Level"?

14 3. Given that the Clean Water Act is a strict liability statute, is Teck Cominco able to
15 avoid liability for a laboratory test result of its effluent taken under accepted and reliable
16 procedures showing a value for cyanide or whole effluent toxicity over its permit limit, by
17 offering a laboratory result from a second lab showing a value for that permit parameter under
18 the permit limit?

19 4. Is violation of a monthly average permit limitation a violation on each day of that
20 month the facility discharges?

21 The Court should grant the motion for Adams on each of these four questions. First,
22 Teck Cominco remains liable for all previous violations of the monthly TDS permit limit, even
23 those outside grayling spawning season, if Adams proves the monthly TDS permit limit has been
24 violated since the filing of this suit (section II). Second, Adams may enforce the 4.0 µg/L
25 monthly cyanide permit limitation; the "Compliance Evaluation Level" elsewhere in the permit is
26 not relevant in this suit (Section III).

27 Third, under the strict liability imposed by the Clean Water Act, if Teck Cominco reports
28 a laboratory result exceeding its permit – even if it also reports a lab result from a second lab

1 showing compliance – Teck Cominco has violated its permit (Section IV). And fourth, a
 2 violation of a monthly average permit limitation is a violation on each day of that month that
 3 Teck Cominco discharged (Section V). Adams respectfully requests that summary judgment be
 4 entered for Adams on each of these discrete legal questions.

5 **II. TECK COMINCO IS LIABLE FOR ALL VIOLATIONS OF THE MONTHLY**
 6 **TDS PERMIT LIMITATION IF THE VIOLATIONS OF THAT LIMITATION**
ARE PROVEN TO BE ONGOING OR CAPABLE OF REPETITION.

7 The answer to the first question is straightforward: Teck Cominco is liable for all
 8 violations of its monthly TDS permit limitation if Adams can prove the violations are ongoing or
 9 capable of repetition.

10 The factual question of whether or not Teck Cominco has violated the monthly average
 11 TDS permit limitation of 170 mg/L found in Permit Condition I.A.1 since the filing of this suit
 12 will be answered by Adams’ proof at trial. The Environmental Protection Agency (EPA)
 13 imposed that Permit Condition, I.A.1 for TDS as a monthly average, on Teck Cominco in 1998.
 14 EPA later modified Teck Cominco’s permit limitations for TDS in the summer of 2003. As a
 15 result of an administrative appeal of that decision, the 1998 permit condition remained in place
 16 until June 15, 2004, when the EPA Appeals Board issued its decision.¹ The Appeals Board
 17 remanded one section of the new permit limitations, leaving in place the 1998 permit limit for
 18 monthly TDS during the spring Arctic Grayling spawning season.²

19 Liability under the Clean Water Act is tied to the date of the violation. *See San Francisco*

21 ¹EPA informed Teck Cominco in October 2003,

22 Until the appeal has been resolved, all conditions of the unmodified 1998 NPDES permit
 23 referenced above remain in effect, including the TDS limits and monitoring requirements
 24 for Outfall 001 contained in Part I.A[.]

25 Trial Exhibit 4, lodged with the Court on January 22, 2008; also attached as Exhibit 1 to
 26 Declaration of Luke Cole in Support of Plaintiffs’ Motion for Summary Adjudication of Four
 Legal Issues (“Cole dec.”).

27 ²The EAB decision also left in place the *daily* TDS permit limitation from the 1998
 28 permit during grayling spawning season, but that is not at issue here as the Court has already
 found the daily TDS violations to be ongoing. Docket 136 at 13.

1 *Baykeeper v. Tosco Corp.*, 309 F.3d 1153, 1160 (9th Cir. 2002) (“Liability for civil penalties
 2 attaches at the time of the violation”); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d
 3 1141, 1144 (9th Cir. 2000) (“As is ordinarily the case with monetary relief, liability for civil
 4 penalties under the Clean Water Act attaches at the time the violations occur, not at the time of
 5 judgment”). Teck Cominco’s liability for its monthly TDS violations (to be proven at trial) has
 6 thus already accrued. The threshold question is whether or not those violations are ongoing or
 7 capable of repetition. The Ninth Circuit has explained that at trial a citizen suit plaintiff may
 8 establish that the violations are ongoing in either of two ways:

9 (1) by proving violations that continue on or after the date the complaint is filed, or (2) by
 10 adducing evidence from which a reasonable trier of fact could find a continuing
 likelihood of a recurrence in intermittent or sporadic violations.

11 *Sierra Club v. Union Oil Co. Of Calif.*, 853 F.2d 667, 671 (9th Cir. 1988) (*Sierra Club III*),
 12 quoting *Chesapeake Bay Foundation v. Gwaltney*, 844 F.2d 170, 71-72 (4th Cir. 1988), *on*
 13 *remand from* 484 U.S. 49 (1987) (“*Gwaltney II*”). The Ninth Circuit also has explained that
 14 intermittent or sporadic violations are to be considered ongoing unless there is “*no real*
 15 *likelihood of repetition.*” *Sierra Club III*, quoting *Gwaltney II* (emphasis by 9th Circuit).

16 Even post-complaint compliance through a loosened permit, such as here, does not
 17 insulate Teck Cominco from liability for its historical violations when that same permit
 18 parameter is capable of being violated and is actually violated after the complaint is filed. “A
 19 citizen suit would lose much of its effectiveness if a defendant could avoid paying penalties by
 20 post-complaint compliance,” observed the Third Circuit in *Natural Resources Defense Council,*
 21 *Inc. v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 504 (3rd Cir. 1993). “It makes no
 22 difference that [Teck Cominco’s] post-complaint compliance was a result of a new, more lenient
 23 NPDES permit instead of [Teck Cominco] affirmatively taking steps to reduce its toxic
 24 discharge. While a polluter awaits changes in permit conditions, it is strictly bound by the terms
 25 of the effective permit.” *Id.* (citing and quoting *Train v. Natural Resources Defense Council,*
 26 *Inc.*, 421 U.S. 60, 92 (1975) (litigation seeking variance to national air standards “is carried out
 27 on the polluter’s time, not the public’s, for during its pendency the original regulations remain in
 28 effect, and the polluter’s failure to comply may subject him to a variety of enforcement

procedures.”).

The relevant legal inquiry for the Court is thus, can the violation of Permit Condition I.A.1 for monthly average TDS that occurred in the past recur? Because that permit condition is still in place, with the same numeric requirement previously violated (170 mg/L), the answer is yes. The factual question of whether or not Teck Cominco has violated this permit condition since this suit was filed in March 2004 is reserved for trial, but if Adams proves Teck Cominco has so violated its permits after the filing of the suit, Teck Cominco is liable for all previous violations of that same permit parameter. “If the same parameter is exceeded [after the Complaint is filed] . . . then the violation will be deemed ‘ongoing’ and liability will attach.” *Sierra Club v. Union Oil Co. of Cal.*, 716 F. Supp. 429, 433 (N.D. Cal. 1988) (*Sierra Club II*).

III. TECK COMINCO CANNOT AVOID LIABILITY FOR THE VIOLATIONS OF PERMIT CONDITION I.A.1 FOR CYANIDE BY RELYING ON PERMIT CONDITION I.A.5.d.

Teck Cominco’s primary defense to the allegations that it has violated the monthly average permit limitation for cyanide of 4.0 µg/L (Condition I.A.1) is to assert that Condition I.A.5.d of the permit – which sets an “interim minimum level” for cyanide of 9 µg/L – overrides I.A.1.³ This assertion fails for four legal reasons: Teck Cominco’s defense is a direct challenge to permit condition I.A.1 in this enforcement action, a challenge which is expressly barred by the Clean Water Act. It is also an impeachment of Teck Cominco’s own DMRs, which for years have reported results as “in violation” of the 4.0 µg/ml permit condition. Further, accepting Teck Cominco’s reading of its permit would impermissibly read out of the permit three other permit provisions. Finally, the Clean Water Act is a strict liability statute, and Teck Cominco has reported cyanide levels in excess of its monthly average permit limitations.

A. Teck Cominco’s cyanide permit conditions.

Teck Cominco’s mine permit addresses monthly cyanide discharges in three places.⁴

³See, e.g., Docket 100 at 50-54 (Teck Cominco’s Opposition to Summary Judgment making this argument).

⁴The Mine Permit is found in its entirety at Trial Exhibit 3000, lodged with the Court on January 22, 2008. Relevant excerpts including the permit conditions at issue in this section are

1 First, Condition I.A.1 (*see* table on page 4 of the permit) specifies the monthly average cyanide
 2 limit that Teck Cominco must meet: 4.0 µg/L. Next (on pages 5-6), Condition I.A.5.b requires
 3 that, “at a minimum, analytical methods should achieve the following method detection limits...
 4 Cyanide, total, 3 µg/L.” Later in the permit (page 6), Condition I.A.5.d states, “Effluent limits
 5 for cyanide, mercury and selenium are not quantifiable using EPA approved analytical methods.
 6 EPA will use the following Interim Minimum Levels as the compliance evaluation level for these
 7 parameters.” There, it lists the Interim Minimum Level for cyanide as 9 µg/L. The permit also
 8 has a provision, III.A, which requires that Teck Cominco “comply with all conditions of this
 9 permit.” Exhibit 2 at 39.

10 **B. Teck Cominco did not appeal permit condition I.A.1 for monthly average**
 11 **cyanide, so it must comply with it.**

12 Under the express language of the Clean Water Act, Teck Cominco is precluded from
 13 attacking one of its permit conditions in this enforcement action. The relevant section, 33 U.S.C.
 14 §1369(b)(2), states that an “Action of the Administrator with respect to which review could have
 15 been obtained under [§1369(b)(1)] shall not be subject to judicial review in any civil or criminal
 16 proceeding for enforcement.” (Section 1369(b)(1) is the part of the U.S. Code allowing a
 17 permittee to appeal a permit granted by the EPA.) If Teck Cominco believed that “any laboratory
 18 analytical result below 9 µg/L would not be competent evidence of the concentration, if any, of
 19 Total cyanide in the sample and should not be used to determine compliance,” as it has asserted
 20 in this case [Docket 100 at 53], the time and place to have raised that was in an appeal of the
 21 permit when it was issued in 1998. Teck Cominco did not appeal the cyanide permit limitations
 22 under §1369(b)(1).⁵

23 Because review under 1369(b)(1) was available to Teck Cominco, 1369(b)(2) bars it from
 24 now challenging the monthly average cyanide limitation in Condition I.A.1 in this enforcement
 25 action. As the Third Circuit has held, “By failing to challenge a permit in an agency proceeding,
 26 _____
 27 attached as Exhibit 2 to Cole dec.

28 ⁵Exhibit 3 to Cole dec. (Teck Cominco’s response to Request for Admission No. 223
 admitting that it did not challenge any of the conditions in its 1998 mine site permit).

[Teck Cominco] has lost ‘forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.’” *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 78-79 (3d Cir. 1990), *quoting Texas Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484-85 (5th Cir. 1988). “[I]f the alleged violator chose to forgo review available under 1369(b)(1),” under the plain language of 1369(b)(2), that violator is prohibited from litigating the terms of its NPDES permit in an enforcement action. *U.S. v. Gulf States Steel, Inc.* 54 F. Supp. 2d 1233, 1242 (N.D.Ala. 1999).

C. Teck Cominco may not impeach its DMRs during this enforcement action.

Teck Cominco’s attack on its permit limit is also an attempt to impeach its own DMRs, in two ways: first, Teck Cominco is asserting that the plain language it used in the DMRs (e.g., “the average of all of the monthly samples exceeded the monthly average limit”⁶) does not actually mean that the permit limit was exceeded. Second, Teck Cominco amended its DMRs years after originally filing them with EPA, to sanitize them by changing the compliance limit in the DMR table for monthly cyanide from 4.0 µg/L to 9.0 µg/L. Neither of these impeachment tactics are legal under the Clean Water Act and Ninth Circuit caselaw.

Under *Sierra Club v. Union Oil of Calif.*, 813 F.2d 1480, 1492 (9th Cir. 1986), *vacated and remanded*, 485 U.S. 931 (1988), *reinstated and amended*, 853 F.2d 667 (1988) (“*Sierra Club I*”), Teck Cominco may not impeach its certified DMRs as a litigation defense. It strains credulity for Teck Cominco to assert that its engineers and managers overlooked a “transcription error”⁷ when they were reporting violations of Teck Cominco’s monthly cyanide limitations over the four calendar years 1999, 2000, 2001 and 2002. Discharge Monitoring Reports constitute admissions of noncompliance that bind the defendant in an enforcement proceeding because the reports are submitted under penalty of perjury. *Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1138 (D. Haw. 1994) (“these self-monitoring reports, known as

⁶See Exhibit 6 to Cole dec.

⁷Teck Cominco called its reporting 4.0 µg/L as the compliance standard in its DMRs a “transcription error” in the KRPC suit. See Exhibit 4 Cole dec., Teck Cominco’s Opposition in the KRPC case, at 57.

1 ‘Discharge Monitoring Reports’ or ‘DMRs,’ are public documents and are submitted under
2 penalty of perjury.”).

3 This Court should reject Teck Cominco’s attempts to impeach its own sworn admissions
4 in the DMRs, particularly when that impeachment comes in amendments to the DMRs dated
5 May 19, 2005 – in some cases almost six years after Teck Cominco filed the DMRs in question
6 with EPA, and more than a year into this lawsuit. Teck Cominco takes this tack despite reporting
7 to EPA in its DMRs, repeatedly over the years, statements such as “the [cyanide] average for the
8 month is above the monthly limit of 4.0 ppb.” September 1999 DMR, Exhibit 5 to Cole dec.⁸

9 **D. Teck Cominco’s reading of the permit would eliminate three conditions of**
10 **the permit.**

11 Teck Cominco’s legal argument to escape liability is based on a reading of the permit
12 which would effectively render three of the permit conditions – I.A.1, I.A.5.b and III.A –
13 completely void. In a nutshell, Teck Cominco argues that because EPA set a separate level of 9.0
14 µg/L in Condition I.A.5.d for EPA to monitor compliance with the permit, Teck Cominco does
15 not have to comply with the earlier permit limitation of 4.0 µg/L found in condition I.A.1.

16 Under the direct terms of the permit itself, the permit must be read to harmonize its
17 conditions, rather than nullify them: Permit Condition III.A, entitled “Duty to Comply,” reads,

18 The Permittee *must* comply with *all* conditions of this permit. Any permit
19 noncompliance constitutes a violation of the Act and is grounds for enforcement action;
for permit termination, revocation and reissuance, or modification; or for denial of a
permit renewal application.⁹

20 To harmonize the permit, one would have to give effect to all three substantive conditions – the
21 permit limit of 4.0 µg/L of I.A.1, the method detection limit of 3.0 µg/L required by I.A.5.b and
22 the Interim Minimum Level of 9 µg/L of I.A.5.d. Teck Cominco’s reading makes three different
23 permit conditions meaningless, an unacceptable interpretation if the permit can be harmonized.

24 To give effect to the entire permit, the Court should interpret the permit so that Teck Cominco

25
26 ⁸See also July 2001 DMR (“the average of all of the monthly samples exceeded the
27 monthly average limit”), Exhibit 6 to Cole dec.; June 2002 DMR (“the actual monthly average
exceeded the monthly average permit limit for total cyanide of 4 ppb”), Exhibit 7 to Cole dec.

28 ⁹Exhibit 2 to Cole dec. at 39 (emphasis added).

1 must comply with the 4.0 µg/L limit of I.A.1, and it must use an analytical method that achieves
 2 a method detection limit of 3 µg/L under I.A.5.b, but that *EPA* would not enforce the permit
 3 unless Teck Cominco violated the higher 9 µg/L limit of I.A.5.d.

4 EPA described 9 µg/L as the “compliance evaluation level” for these parameters. Exhibit
 5 2 to Cole dec. at 6. Importantly, nothing in Section I.A.5.d allows Teck Cominco to ignore the
 6 plain language of sections I.A.1, I.A.5.b and III.A: like a Compliance Order by Consent, permit
 7 condition I.A.5.d is only a tacit agreement between Teck Cominco and EPA that EPA will not
 8 enforce the lower permit limit. That agreement does not preclude another party, such as Adams
 9 or the State of Alaska, from enforcing the lower permit level found in I.A.1; *see, e.g.*, permit
 10 condition III.A.

11 **E. The Clean Water Act is a strict liability statute.**

12 Finally, Teck Cominco is bound by the cyanide permit limitation in Condition I.A.1 and
 13 its admissions in its DMRs because the Clean Water Act imposes strict liability. 33 U.S.C. §
 14 1311(a); *Hawaii’s Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1392
 15 (D. Haw. 1993). *EPA itself* set the permit limit at 4.0 µg/L in Condition I.A.1, set the method
 16 detection limit requirement of 3.0 µg/L in Condition I.A.5.b, and included Condition III.A
 17 creating the mandatory duty to comply with *all* permit conditions. Exhibit 2 to Cole dec. EPA
 18 set these permit limits in 1998, a decade ago, and they remain in place today. Had EPA felt the
 19 4.0 µg/ml standard was incorrect, it has had 10 years to change it. EPA modified the permit in
 20 2003, but chose not to address the cyanide permit limitation at that time. Cole dec. ¶10. Teck
 21 Cominco has routinely reported violating the cyanide monthly permit limitation,¹⁰ as Adams will
 22 demonstrate at trial, and under the strict liability of the Clean Water Act Teck Cominco must be
 23 held liable for that non-compliance.

24 Teck Cominco’s challenge to its mine site permit, and its impeachment of its own DMRs
 25 over a six-year period, ignores the Clean Water Act, 33 U.S.C. §1369(b)(2), which precludes
 26 challenging a permit condition in an enforcement action; ignores Ninth Circuit case law
 27

28 ¹⁰*See, e.g.*, Exhibits 5, 6 and 7 to Cole dec.

1 prohibiting impeachment of certified DMRs; ignores the express language of the *entire* permit;
 2 and ignores the Clean Water Act's strict liability scheme. This Court should thus grant summary
 3 judgment for Adams and hold that the 4 µg/L found in permit Condition I.A.1 is enforceable.

4 **IV. THE "SPLIT SAMPLE" DEFENSE IS CONTRARY TO THE STRICT**
 5 **LIABILITY REGIME OF THE CLEAN WATER ACT.**

6 Although the Clean Water Act is a strict liability statute, Teck Cominco has attempted to
 7 evade liability in this suit for some of its reported permit violations by asserting what is known as
 8 the "split sample" or "laboratory error" defense: Teck Cominco has conceded that there are
 9 laboratory test results of its effluent taken under accepted and reliable procedures which show
 10 values for cyanide and whole effluent toxicity over its permit limits, but it points to separate
 11 laboratory test results, by a second laboratory, showing values below the permit limit, to assert
 12 compliance.¹¹ This approach is contrary to the Clean Water Act and Ninth Circuit caselaw.

13 Teck Cominco began to routinely send its cyanide field samples to two different
 14 laboratories in the summer of 2002, when the Kivalina Relocation Planning Committee first sent
 15 a notice letter pointing out Teck Cominco's violations of its cyanide permit limits. When the
 16 samples from one laboratory would come back with a result over the permit limit and from
 17 another with a result under the permit limit, Teck Cominco would report both results in the
 18 narrative (or "cover letter") portion of the DMR, but not label these results as a "violation" in the
 19 DMR by choosing the lab results with the lower test result to assert that it was in compliance
 20 with the permit.

21 To assert this "split sample" defense, Teck Cominco must impeach the results of the
 22 laboratories that undertook the analyses that indicate violations, laboratory results which it
 23 reported in its monthly DMRs.¹² At the summary judgment stage, Teck Cominco attempted that

24 ¹¹Teck Cominco has raised the split sample defense in its filings in this case, including in
 25 its Opposition to Motion for Summary Judgment at 48-49 [Docket 100].

26 ¹²Teck Cominco reports all of the laboratory results in its DMRs. See Deposition of Mark
 27 Thompson, March 3, 2005, at 35:3-22, attached as Exhibit 8 to Cole dec.:

28 Q. ...Now, if you do a split sample and another lab comes back with a value that is

1 impeachment through declarations of its consultants and staff. *See, e.g.*, Docket 100 at 48.
2 Adams requests summary judgment on the legal question of whether, given that the Clean Water
3 Act is a strict liability statute, Teck Cominco is able to avoid liability for a laboratory test result
4 of its effluent taken under accepted and reliable procedures showing a value for cyanide or whole
5 effluent toxicity over its permit limit, by offering a laboratory result from a second lab showing a
6 value for that permit parameter under the permit limit. Through this summary judgment motion,
7 Adams seeks a decision that will preclude Teck Cominco from attempting to impeach its DMRs
8 at trial.

9 Teck Cominco's attempts to impeach its own DMRs are not allowed in the Ninth Circuit.
10 In the controlling case on point, *Sierra Club I*, 813 F.2d at 1492, the Ninth Circuit disapproved
11 the use of sampling errors as a defense to a claim based on a reported violation of an NPDES
12 permit. The *Sierra Club I* Court explained why sampling errors cannot be used to defend against
13 claims that an NPDES permit has been violated:

14
15 _____
16 above your permit parameter, what do you do with that value?

17 A. It's in the DMR.

18 Q. So it's reported in the DMR?

19 A. It's reported right here. All values are reported here. We don't withhold any
20 values.

21 Q. When you're saying "here," what are you referring to?

22 A. The DMR.

23 Q. The narrative portion? The letter portion?

24 A. Sometimes it's in what -- the portion of the DMR we call the cover letter.
25 Sometimes it's in tables as attachments. Generally is here, but it can vary. All
26 data is reported. We don't hold back any data. We report it all.

27 Q. Okay. So the cover letter, the forms and the attachments are all part of the DMR?

28 A. Yes.

1 Were we to accept Union Oil's argument regarding the use of sampling errors to excuse
 2 reported permit exceedances, we would be sanctioning countless additional hours of
 3 NPDES litigation and creating new, complicated factual questions for district courts to
 4 resolve. As indicated by the legislative history, Congress hoped to limit such situations. In
 5 addition, if each self monitoring report is to be considered only prima facie rather than
 6 conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra
 7 Club would be taking a considerable risk whenever they initiated a citizen enforcement
 8 action While a permittee's publicly filed reports might clearly indicate that illegal
 9 pollution was taking place, the permittee might have additional information unavailable
 10 to citizen groups indicating that sampling error rendered the reports meaningless. Finally
 11 and most importantly, allowing permittees to excuse their reported exceedances by
 12 showing sampling error would create the perverse result of rewarding permittees for
 13 sloppy laboratory practices. Such an approach would surely undermine the efficacy of the
 14 self-monitoring program.

15 *Id.* As the Ninth Circuit held, "We conclude that when a permittee's reports indicate that the
 16 permittee has exceeded permit limitations, the permittee may not impeach its own reports by
 17 showing sampling error." *Sierra Club I*, 813 F.2d at 1492. Teck Cominco has tried to skirt
 18 *Sierra Club I*, arguing that in picking and choosing among favorable samples, it is not sampling
 19 error but instead using the "correct" sample to show there was no violation. (Interestingly, the
 20 "correct" sample is always the lowest of the two numbers.) This court rejected Teck Cominco's
 21 similar argument in an earlier published opinion, *Adams v. Teck Cominco Alaska, Inc.*, 396
 22 F.Supp.2d 1095, 1102 (D.Alaska 2005):

23 Teck's arguments for distinguishing *Sierra Club* are not persuasive. In essence, they boil
 24 down to the proposition that Teck does not seek to use sampling error as a defense but
 25 rather to use the "correct" DMR to show there was no violation. Such an approach still
 26 falls within the reach of the *Sierra Club* rationale. First, litigating over which of two
 27 reports is the "correct" one encourages additional hours of litigation. In a related way,
 28 providing Adams' counsel with a second "correct" report on March 7, 2003, did not
 reduce plaintiff's litigation risk, unless one first posits that the second report must
 necessarily be the correct one. Third, while it may be that the "sloppy" lab work here was
 that of CT&E, not Teck or Columbia, CT&E was the contractor chosen by Teck to
 analyze samples for reporting purposes, and so it is not unfair to require Teck to bear the
 consequences of CT&E's presumed error. Finally, it may be noted that there is a
 sampling error issue inherent even in the "corrected" DMR, because it recited lab results
 from CT&E which would show a violation unless they are discredited as erroneous.

Id. at 1102. The Court also noted that plaintiffs would bear the risk of incurring "needless costs
 by initiating litigation which would not succeed if a defendant could then put on proof of
 sampling error remains." *Id.* The Court should apply this law of the case to Teck Cominco's
 new application of the split sample defense, and enter summary judgment for Adams precluding
 the "split sample" defense at trial.

V. A VIOLATION OF A MONTHLY AVERAGE PERMIT LIMITATION IS CONSIDERED A VIOLATION ON EACH DAY OF THE MONTH THE FACILITY DISCHARGED.

Violations of a monthly average limit mean that the permit was violated on each day the facility discharged in that month. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 313-15 (4th Cir. 1986), *vacated and remanded on other grounds*, 484 U.S. 49 (1987). In that case, defendant Gwaltney argued that a monthly average limitation should be treated as a single day of violation, but the Fourth Circuit disagreed. *Id.* at 313. As the Ninth Circuit noted in *United States v. Trident Seafoods Corp.*, 60 F.3d 556 (9th Cir. 1995),

The Court reasoned that the Clean Water Act ‘speaks in terms of penalties per *day* of violation, rather than penalties per *violation*.’ *Chesapeake Bay*, 791 F.2d at 314. ‘This language strongly suggests that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period.’

Id. at 558. This legal point is directly relevant to Adams’ claims that Teck Cominco violated its monthly average permit limitations for TDS, cyanide and whole effluent toxicity (WET).

A District Court in the Ninth Circuit recently expressly embraced the *Gwaltney* reasoning cited above, in *Sierra Club v. City and County of Honolulu*, 2007 U.S. Dist. LEXIS 80452 (D. Haw. 2007). There, in a Clean Water Act enforcement suit like this one, the Court extended the logic of *Gwaltney* to find that, in addition to a violation of a monthly average limit counting as a violation of every day of the month (*id.* at *17), “a violation of an annual limit counts as a violation of each day of the year.” *Id.* at *20. In reaching this decision, the District Court was also persuaded by the Ninth Circuit’s opinion in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001). In *Borden Ranch*, the Court rejected an argument by the defendant that he should not be assessed a separate penalty for each separate violation on a single day, finding that such a rule would create serious incentive problems. *Id.* at 817-18. Persuaded by *Gwaltney* and *Borden*, the Court in *City and County of Honolulu* found that “the focus should continue to be imposing liability for each day for the time period that the defendant is in violation of a Permit standard.” *Id.* at *19-*20. Thus, for purposes of assessing liability, violations of a monthly average limit count as a violation on each *day* the facility discharged in that *month*. The Court should enter summary judgment on this legal question for Adams.

1 **VI. CONCLUSION**

2 Adams respectfully requests that the Court to grant summary judgment on each of the
3 questions to Adams, as set forth in the attached Proposed Order [Docket 241-2].

4 Respectfully submitted this 8th day of February, 2008.

5
6 /S/ Luke Cole
7 Luke Cole
8 Attorney for Plaintiffs
9

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on the 8th day of February 2008, a true and correct copy of the foregoing Motion for Summary Judgment on
12 Four Legal Issues and Proposed Order was served, via electronic mail, on the below identified parties of record:

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